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October 2, 2015

The Honorable Jocelyn D. Boyd
Chief Clerk/Administrator
Public Service Commission of South Carolina
101 Executive Center Drive
Columbia, SC 29210

Re: 2015-290-C-Petition of the South Carolina Telephone Coalition for a Determination that Wireless Carriers are Providing Radio-Based Local Exchange Services in South Carolina that Compete with Local Telecommunications Services Provided in the State
Docket No. 2015-290-C

Dear Ms. Boyd:

Enclosed for filing in the above referenced docket please find the South Carolina Telephone Coalition's Response to Motion to Dismiss Petition, or, in the Alternative, Expand Scope of Proceeding, and to Suspend Case Schedule.

We are serving a copy of this response on parties of record through e-mail as permitted by Commission Regulation 103-830.1. All parties of record have consented to electronic service in writing. The written agreement memorializing the parties' consents will be filed with the Commission.

Thank you for your assistance in this matter.

Very truly yours,

McNAIR LAW FIRM, P.A.

Margaret M. Fox

MMF:dmf
Enclosures

cc: All counsel of record (*w/Encls.*)

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BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

Docket No. 2015-290-C

In Re: Petition of the South Carolina Telephone Coalition For a Determination That Wireless Carriers are Providing Radio-Based Local Exchange Services in South Carolina that Compete with Local Telecommunications Service Provided in the State	))))))

SOUTH CAROLINA TELEPHONE COALITION'S RESPONSE TO MOTION TO DISMISS PETITION, OR, IN THE ALTERNATIVE, EXPAND SCOPE OF PROCEEDING, AND TO SUSPEND CASE SCHEDULE

The South Carolina Telephone Coalition and its member companies (collectively referred to as "SCTC") hereby submits the within response, pursuant to Commission Regulation 103-829(A), to the Motion to Dismiss Petition, or, in the Alternative, Expand Scope of Proceeding, and to Suspend Case Schedule (the "Motion") filed by CTIA—The Wireless Association® ("CTIA") in the above-captioned proceeding on September 28, 2015. For the reasons stated herein, SCTC respectfully requests that the Commission deny CTIA's Motion in all respects, and proceed to hear the matter as scheduled.

I. INTRODUCTION

CTIA's motion is without merit and should be denied. The motion is a transparent attempt to delay the proceeding on this issue. The determination SCTC has asked the Commission to make – that nonwireline services are being provided in competition with landline services in South Carolina – is long overdue. As will be shown in the evidence to be presented at the hearing on November 3, wireless carriers are providing services in South Carolina that compete with local

landline services. As such, they are required to contribute to State USF to keep service affordable for all South Carolina citizens, just as all other telecommunications carriers do, and as required by South Carolina law. Every day that goes by is a day that wireless carriers should be contributing to the State USF and do not.

II. ARGUMENT

A. The Petition is Sufficient to Support the Relief Requested and Provides Adequate Notice to Wireless Carriers

1. The Petition is Sufficient to Support the Relief Requested

CTIA's suggestion that the Petition in this matter is deficient because it fails to plead facts sufficient to support a claim for relief is without merit. The Petition at issue is not a "complaint" and does not state a "claim" or cause of action which must be pled in some specific manner. Instead, it is a request that the Commission proceed to make a determination under statutes enacted by the South Carolina General Assembly that expressly delegate this fact-finding authority to the Commission. In fact, as CTIA acknowledges, whether and how to proceed with this determination is a matter that is within the Commission's discretion, and "[t]he Commission is not required to proceed merely because the SCTC has requested it to do so."[1] In other words, ***the SCTC's Petition was not even necessary in order to initiate this proceeding and, therefore, cannot be considered deficient***. The SCTC appropriately requested by its Petition that the Commission proceed to consider this issue and make a determination. The Commission appropriately directed that notice be published, and scheduled a hearing to take evidence upon which such a factual determination can be made.

[1] Motion at 4.

Commission Order No. 2003-656, cited by CTIA in support of its motion to dismiss,[2] actually supports the argument that the case should ***not*** be dismissed under Rule 12(b)(6), SCRCP. That case, like this one, involved the Commission's interpretation of statutory authority that had been delegated to it by the South Carolina General Assembly. That case, like this case, was initiated by the filing of a petition asking the Commission to conduct a hearing and to make findings pursuant to the statute.[3] In that case, as in this case, an intervenor moved to dismiss the petition under Rule 12(b)(6). The Commission ***denied the motion***, which was converted to a motion for summary judgment at the close of Staff's case, finding the evidentiary facts that had been presented to the Commission ***during the hearing*** constituted a sufficient basis to avoid dismissal of the case under Rule 12(b)(6) and to avoid the granting of summary judgment. The Commission recognized that, in a case where a request is made for the Commission to take some statutory action that has been delegated to it by the General Assembly, it is not necessary to "plead" facts, but instead to build an evidentiary factual record before the Commission to enable it to make the necessary statutory findings.

CTIA also cites a prior proceeding as "precedent" for the notion that there must be substantial evidence in the record before the Commission can establish the existence of competition.[4] We agree. That is why the SCTC in this matter has asked the Commission to establish such an evidentiary record. In the prior proceeding, no evidence was presented regarding the existence of competition. The Commission properly found that "while the record before us in not sufficient to make a finding otherwise, we reserve the right to revisit this issue."[5] That is

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[2] *See* Motion at p. 4, n. 3.
[3] The case involved one petition and one complaint in Docket Nos. 2002-367-C and 2002-408-C that were consolidated for hearing. Collectively, the petition and complaint involved interpretation and application of two statutory provisions.
[4] *See* Motion at p. 5, referencing the State USF proceeding on July 17, 2000 in Docket No. 1997-239-C.
[5] Commission Order No. 2001-419 at p. 37.

exactly what we have asked the Commission to do in this proceeding, and why we pre-filed testimony on September 29, as directed, to establish the required factual showing.

Even if the Petition could be construed as a "complaint," which it is not, the allegations contained therein are sufficient.[6] SCTC's Petition asks the Commission to determine that wireless carriers who are not ETCs likewise compete with local telecommunications services offered in the State, and specifically references the relevant statutory language – i.e. that such a finding is appropriate where telecommunications carriers are providing nonwireline services in competition to landline services and are providing radio-based local exchange services in this State that compete with local telecommunications service provided in this State.[7] Those allegations match the statutory requirements pursuant to which the Commission "shall require" companies to contribute to State USF. The points CTIA alleges were not pled appear to be legal definitions and conclusions or evidentiary points to be presented at the hearing.

CTIA also argues in a footnote that the relief requested is invalid because it constitutes an adjustment of charges that can only be made through an application.[8] This is simply not true. This is not a case where the Commission will fix or adjust rates and charges. The only issue is whether wireless is a competitive service and, therefore, *under the 1996 Act*, whether wireless providers must contribute to the State USF like all other telecommunications carriers.

2. Adequate Notice was Provided

The Petition itself and the notice that was published in newspapers of general circulation throughout the State were sufficient to put all wireless carriers operating in South Carolina on

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[6] *See Charleston County School District v. Robert W. Harrell*, 393 S.C. 552, 713 S.E.2d 604 (2011) (a motion to dismiss under Rule 12(b)(6), SCRCP, may not be sustained if the facts alleged in the complaint and the inferences drawn therefrom would entitle the plaintiff to relief under any theory; pleadings are to be liberally construed). Again, this case does not involve a "complaint," but even if it could be construed as such, the 12(b)(6) motion would fail.

[7] *See* Petition at p. 2.

[8] *See* Motion at p. 7, n. 10.

notice that the Commission will make a determination regarding whether wireless services are being provided in competition with landline services in the State, as expressly contemplated by the South Carolina General Assembly in the 1996 State Telecommunications Act.

South Carolina statutes do not require a company-by-company determination of whether wireless service is being provided in competition with landline services in the State. S.C. Code Ann. § 58-9-280(E)(2) provides:

> The commission shall require all telecommunications companies providing telecommunications services within South Carolina to contribute to the USF as determined by the commission.

"Telecommunications services" are defined in State law as "services for the transmission of voice and data communications to the public for hire, *including those nonwireline services provided in competition to landline services*." S.C. Code Ann. § 58-9-10(15) (emphasis added).

In other words, S.C. Code Ann § 58-9-280(E)(2) provides the general rule that carriers providing nonwireline services in competition to landline services are required to contribute to the USF as determined by the commission. Every day that goes by without a determination that wireless carriers are, in fact, providing nonwireline services in competition to landline services is a day that they should be contributing to State USF and are not.

In support of its notice argument, CTIA cites to S.C. Code Ann. § 58-9-280(E)(3), which provides: "The commission also shall require any company providing telecommunications service to contribute to the USF if, after notice and opportunity for hearing, the commission determines that the company is providing private local exchange services or radio-based local exchange services in this State that compete with a local telecommunications service provided in this State."

Thus, Subsection (E)(3) provides a method to require *specific* carriers to contribute upon a showing as to that particular carrier. For example, the Commission has previously required

wireless eligible telecommunications carriers ("ETCs") to contribute to the State USF, without making the general wireless industry finding contemplated by Subsection (E)(2).

Even if notice to wireless companies were required, the notice that was provided is sufficient, and no real challenge can be maintained that wireless carriers did not receive actual notice of the hearing.[9] Nowhere does the statute indicate that anything more is required. The wireless carriers are also being provided an opportunity to be heard, as is further provided by the statute. A failure to participate on their part is not a shortcoming in the process provided, but instead is their choice not to avail themselves of this process.

Contrary to CTIA's suggestion, it was not necessary for the Petition to name specific carriers and services in order for wireless carriers to be on notice of this proceeding. If "CTIA—The Wireless Association®" is on notice that the proceeding could impact wireless carriers, then the wireless carriers themselves are or should be as well. CTIA's Petition to Intervene in this matter included a link to CTIA's website, which lists its members, officers, and Board of Directors. CTIA's Officers and Board of Directors include the President and CEO of Verizon Wireless, the President and CEO of AT&T Mobility, the President and CEO of Sprint Corporation, and the CEO of T-Mobile USA, among others.

It is interesting that CTIA cites to a proceeding in the State USF docket, Docket No. 1997-239-C, as precedent on this issue. In that proceeding, the issue of whether wireless carriers would be required to contribute to State USF was not raised in the Petition that initiated the proceeding, nor was it mentioned in the notice that was published regarding that proceeding. Yet, Verizon

[9] Under South Carolina law, notice can either be actual or constructive. "Notice is regarded as actual where the person sought to be charged therewith either knows of the existence of the particular facts in question or is conscious of having the means of knowing it, *even though such means may not be employed by him.* ... Constructive notice is a legal inference which substitutes for actual notice. It is notice imputed to a person whose knowledge of facts is *sufficient to put him on inquiry* ...." *Strother v. Lexington County Recreation Comm'n*, 332 S.C. 54, 63 n. 6, 504 S.E.2d 117, 122 n. 6 (1998) (emphasis added). In this case, wireless carriers have received *both* actual and constructive notice.

Wireless and Sprint intervened to ensure that their rights were protected. In fact, Verizon Wireless, the largest wireless carrier operating in the State, has been very diligent in intervening and monitoring every single proceeding in which the issue of wireless competition *might* have been raised.[10] Now that a proceeding has been established for the *sole purpose* of addressing that issue, Verizon Wireless is choosing not to participate directly in this proceeding, while CTIA — an association of which it is an active member — participates as a party. Verizon Wireless' President and CEO is an Officer of CTIA and sits on the Board of Directors. Sprint likewise has appeared in similar proceedings,[11] and did not intervene separately in this proceeding. Sprint's President and CEO is a member of CTIA's Board of Directors.

B. There is No Basis to Expand the Scope of This Proceeding

The issue presented for the Commission's consideration in this matter is a narrow one, and one that was statutorily delegated to the Commission in 1996. There is no reason or basis to expand the scope of this proceeding to include a reexamination of the State USF.

The Commission has held numerous hearings regarding the State USF. The proceedings in Docket No. 1997-239-C that took place from 1996 to 2001 culminated in the establishment of the State USF in late 2001. The various orders issued by the Commission were appealed to the Supreme Court of South Carolina and were upheld. In fact, the Supreme Court praised the Commission's thorough examination of this complex matter, stating:

> The Commission's orders are meticulous in their factual determinations and decisions regarding the appropriate methods for implementing the State USF. The orders issued by the Commission throughout the consideration of the USF show careful consideration of numerous proposals on the fund's implementation ... The

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[10] *See, e.g.*, various hearings and proceedings in Docket No. 1997-239-C conducted on (1) July 17-21, 2000; (2) January 29, 2003; (3) May 5, 2004; and (4) September 22, 2004 (in which counsel for Verizon Wireless appeared). *See also* Docket No. 2009-326-C (Cellco Partnership d/b/a Verizon Wireless and Verizon Communications, Inc. intervened in State USF bundling proceeding).

[11] *See, e.g.*, Interventions of Sprint Communications, L.P. and Sprint Nextel Corporation in Docket Nos. 1997-239-C and Docket No. 2009-326-C.

> orders alone and the orders for which the Commission considered motions for reconsideration have presented an insurmountable hurdle for Appellants in refuting the Commission's conclusion substantial evidence supports its decisions in developing the intricacies of the fund.[12]

As recently as 2010, the Commission reaffirmed its prior findings that the State USF ensures the continuation of universal service in South Carolina; that the State USF benefits South Carolina citizens by providing support for basic local exchange telephone service provided by COLRs in high-cost areas, thereby ensuring access to basic service at affordable rates, and at rates that are comparable for urban and rural areas; and that the State USF is consistent with state and federal policy.[13]

It is understandable that certain competitive carriers would want to maintain a competitive advantage by avoiding contributing to the State USF, as other telecommunications carriers are required to do. However, that is no basis for the Commission to consider "reducing the size" of a fund that has allowed Carriers of Last Resort ("COLRs") to provide service in high cost areas of the State that would not be served by competitive carriers. State USF enables COLRs to build and maintain the critical communications infrastructure that has not only allowed South Carolina citizens to enjoy high-quality, reliable communications service, but has also allowed the State to attract and retain industry and jobs to the State. As Mr. Oliver stated in his pre-filed testimony in this docket:

> State USF has allowed Home Telephone, for example, to attract a large Google data center in 2008, with a $600 million expansion announced in 2013. In May 2015, Volvo announced that it had selected a location in Berkeley County (within Home Telephone's service area) to invest $500 million to build a new plant that would initially produce up to 100,000 cars per year, bringing 2,000 jobs to the area. Other SCTC member companies have seen similar economic development in the rural areas in which they operate that would not be possible without robust communications networks in these rural areas of the State.

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[12] *Office of Regulatory Staff v. South Carolina Public Serv. Comm'n*, 374 S.C. 46, 54, 647 S.E.2d 223, 227 (2007).
[13] Commission Order No. 2010-337 in Docket No. 2009-326-C, at p. 22.

The statistics cited by CTIA regarding telephone service penetration rates actually help prove the point.[14] High telephone penetration rates are maintained precisely because there are COLRs in South Carolina willing to provide service in high cost areas that competitive carriers would not choose to serve.[15]

CTIA's allegations regarding administration and oversight of the State USF are also unfounded. There is no basis for these claims.[16]

C. The Commission Should Not Suspend the Procedural Schedule in This Matter

The Commission should not suspend the procedural schedule in this matter, as CTIA requests. The hearing has already been delayed once in order to allow all parties adequate time to prepare and file testimony. SCTC filed its testimony on September 29, in accordance with the current schedule. CTIA and the wireless companies received adequate notice and opportunity to participate in the proceeding. The fact that they have chosen to use their time to interpose a motion for the purpose of delay, instead of preparing substantive testimony on the narrow issue before the Commission, should not sway the Commission to the prejudice of other parties who are proceeding in good faith.

As stated herein, every day that goes by is a day that the wireless carriers should be contributing to the State USF and can dodge that responsibility. CTIA's member companies

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[14] *See* Motion at p. 9.

[15] While CTIA attempts to make a point that other states without a state USF have similarly high telephone penetration rates (*see* Motion at p. 10), the point is that all of these states have carriers who provide service in high-cost areas and must be able to recover those costs in some manner. Forward-looking states like South Carolina have implemented state universal service funds. In other states, carriers must recover their costs through higher end user rates, through higher access charges, by curtailing expenditures to maintain and upgrade communications infrastructure, or by some combination of these methods.

[16] See, e.g., *Office of Regulatory Staff v. South Carolina Public Serv. Comm'n*, 374 S.C. 46, 647 S.E.2d 223 (2007) (finding the Commission's orders establishing the State USF were meticulously detailed and demonstrated the Commission's control over the size of the fund); Commission Order No. 2014-786 in NDI 2013-6-C (responding to questions about the administration of the fund and finding "the Office of Regulatory Staff has done an excellent job of administering the Universal Service Fund as guided by the Commission's orders ....").

benefit from every delay they can get. CTIA's intentions in this regard are evidenced by the statement: "Even if CTIA's motion is denied, a revised schedule will be necessary ...." The Commission should reject this self-serving statement that even *denying* a motion for delay would necessitate a delay, and should deny CTIA's motion in all respects and proceed with the hearing as scheduled.

Respectfully submitted,

By: _____

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Columbia, South Carolina

October 2, 2015

BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

Docket No. 2015-290-C

Re:	Petition of the South Carolina Telephone Coalition For a Determination That Wireless Carriers are Providing Radio-Based Local Exchange Services in South Carolina that Compete with Local Telecommunications Service Provided in the State	**CERTIFICATE OF SERVICE**

I, Dennie Fyfe, do hereby certify that I have this date served one (1) copy of South Carolina Telephone Coalition's Response to Motion to Dismiss Petition, or, in the Alternative, Expand Scope of Proceeding, and to Suspend Case Schedule upon the following parties of record via e-mail to:

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